

U. S. vs. ALUMINUM CO., OF AMERICA, ET AL.
IN THE DISTRICT COURT OF THE UNITED STATES FOR
THE SOUTHERN DISTRICT OF NEW YORK.

Civil Action No. 18-31.

UNITED STATES OF AMERICA, PLAINTIFF

VS.

ALUMINUM COMPANY OF AMERICA, THE DOW CHEMICAL
COMPANY, AMERICAN MAGNESIUM CORPORATION, MAG-
NESIUM DEVELOPMENT CORPORATION, DEFENDANTS.

FINAL JUDGMENT.

The United States of America having filed its complaint herein on April 15, 1942; each of the above-named defendants having appeared and filed their answers to such complaint and asserted the truth of their answers and their innocence of any violation of law; no testimony having been taken, each of said defendants consents to the entry of this decree, without any findings of fact, upon condition that neither such consent nor this decree shall be evidence, admission or adjudication that they have violated any statute of the United States, and that this decree shall relate solely to future conduct; and the United States of America, by its counsel, having consented to the entry of this decree and to each and every provision thereof, and having moved this Court for this injunction,

Now, THEREFORE, it is
ORDERED, ADJUDGED, AND DECREED as follows:

I

That this Court has jurisdiction of the subject matter and of all the parties hereto; that the complaint states

a cause of action against the defendants under the Act of Congress of July 2, 1890, entitled "An Act To Protect Trade and Commerce Against Unlawful Restraints and Monopolies" and the acts amendatory thereof and supplemental thereto.

II

As used in this decree, the following terms have the following meanings:

(a) The words "production patents" mean all United States patents issued prior to the date of the entry of this decree and all United States patents which may issue upon all patent applications filed prior to January 30, 1941, relating to the reducing or smelting of magnesium from ores or chemical compounds by any machine, apparatus, or process in any manner and including the mining, processing, treating, refining, purifying, or producing of raw or intermediate materials used for the purpose of producing magnesium.

(b) The words "fabrication patents" mean all United States patents issued prior to the date of the entry of this decree and all United States patents which may issue upon all patent applications filed prior to January 30, 1941, relating to the working or treating of magnesium or alloys containing more than fifty per cent. (50%) of magnesium, the manufacture of such alloys and of products made from magnesium or such alloys by any machine, apparatus, or process in any manner and to such alloys or products.

(c) The words "present emergency" mean the existing state of war between the United States and Germany, Italy and Japan, and the emergency shall be considered to have ended six months after the cessation of hostilities between the United States and each and all of said nations pursuant to an armistice or unconditional surrender previously signed or made.

(d) The word "affiliates" shall mean and include any corporation, more than fifty per cent. (50%) of the voting stock of which is owned by any defendant, or

by any applicant referred to in Paragraphs V and VI hereof; any corporation, more than fifty per cent. (50%) of the voting stock of which is owned by such an affiliate; any successor corporation hereafter acquiring the assets of any defendant by merger or consolidation; any corporation, more than fifty per cent. (50%) of the voting stock of which is owned by any such successor corporation; any corporation which owns more than fifty per cent. (50%) of the voting stock of any defendant or such applicant; any corporation, more than fifty per cent. (50%) of the voting stock of which is held by any corporation or person owning more than fifty per cent. (50%) of the voting stock of any defendant or such applicant; and shall also include any corporation engaged in the production or fabrication of magnesium which is actually controlled and directed, through stock ownership or otherwise, by any defendant or any such applicant or any affiliate thereof; *provided, however*, that none of the corporate defendants, or any of their affiliates shall be prosecuted for any violation of this decree alleged to have been committed by any alleged affiliate, whose affiliation is alleged to be predicated upon actual control and direction of its affairs unassociated with the ownership of stock to the extent of more than fifty per cent. (50%) unless this Court shall determine in this proceeding that prior to the commission of any such act, the affairs of the alleged affiliate had been actually so directed and controlled, that it is an affiliate within the meaning of this section, and that the decree was knowingly violated by such affiliate.

III

All patent licenses and agreements embodying patent licenses between defendants Aluminum Company of America and American Magnesium Corporation and Magnesium Development Corporation, or any of them, on the one hand, and defendant Dow Chemical Company on the other hand, entered into between the year 1927 and the date of entry of this decree, are hereby canceled as of the date of the entry of this decree, and the defend-

ants, their affiliates, officers, directors, managers, employees, and agents, and each of them, be, and they hereby are perpetually enjoined and restrained from taking any action either individually or in concert with each other, under or pursuant to said licenses and agreements; *provided, however*, that nothing contained in this paragraph shall prevent the granting of licenses by any defendant to any other defendant not contrary to the provisions of this decree.

IV

All patent licenses and agreements embodying patent licenses or rights to receive such licenses obtained by defendant American Magnesium Corporation or defendant Aluminum Company of America or any of its affiliated companies under the patents of defendant Magnesium Development Corporation before the date of the entry of this decree are hereby canceled as of the date of the entry of this decree; *provided, however*, that nothing contained in this paragraph shall prevent the granting of licenses by any defendant to any other defendant not contrary to the provisions of this decree.

V

Each of the corporate defendants and its affiliates shall, upon the written request of any applicant, grant to such applicant, including any of the other defendants herein, a non-exclusive, non-assignable right to use, manufacture and sell within the United States under any and all "fabrication patents" where the patent or application therefor was owned by it on the date of the entry of this decree, without any restrictions or conditions whatsoever, except such suitable restrictions as may be necessary pursuant to U. S. C. Title 35, Para. 49, 44 Stat. 1058, and without payment of any royalty or other compensation; *provided* that no such defendant or any of its affiliates shall be required to grant any such right, other than with reasonable royalty as hereinafter provided, to any applicant or any affiliate of such applicant who shall refuse to grant said defendant and its

affiliates a similar right, without payment of royalty or other compensation, to use, manufacture, and sell under all "fabrication patents" where the patent or application therefore was owned on the date of the entry of this decree by such applicant or any affiliate of such applicant or under which such applicant or affiliate had the right to grant sub-licenses on the date of the entry of this decree, and in case of such refusal, such defendant or its affiliate shall grant such license but in such case shall be entitled to charge a reasonable royalty in connection with any such grant to such applicant. In case of any controversy between any defendant or affiliate of any defendant and any applicant for a right to use, manufacture and sell under any patent arising out of the terms of this paragraph, the refusal of the defendant or its affiliate to grant such right shall not be deemed a violation of this decree punishable by contempt, unless this Court, upon an order to show cause issued upon the petition either of the applicant refused such right or upon the petition of the United States of America, shall finally determine that such refusal was not justified under the provisions of this paragraph of the decree and the defendant or affiliate refusing to grant such right shall thereafter fail to comply with the directions of this Court.

VI

(a) Each of the corporate defendants and its affiliates shall, upon the written request of any applicant, grant to such applicant, including any of the other defendants herein, a non-exclusive, non-assignable right to use, manufacture and sell within the United States under any and all "production patents" where the patent or application therefor was owned by it on the date of the entry of this decree, without any restrictions or conditions whatsoever, except such suitable restrictions as may be necessary pursuant to U. S. C. Title 35, Para. 49, 44 Stat. 1058, and without payment of royalty or other compensation during the existence of the "present emergency" and for the period of the "present emergency";

provided, that no such defendant or any of its affiliates shall be required to grant any such right, other than with reasonable royalty as hereinafter provided, to any applicant or any affiliate of such applicant who shall refuse to grant said defendant and its affiliates a similar right, without payment of royalty or other compensation, to use, manufacture, and sell under all "production patents" where the patent or application therefor was owned on the date of the entry of this decree by such applicant or any affiliate of such applicant or under which such applicant or affiliate had the right to grant sublicenses on the date of the entry of this decree, and in case of such refusal, such defendant or its affiliate shall grant such license, but in such case shall be entitled to charge a reasonable royalty in connection with any such grant to such applicant.

(b) At the termination of the "present emergency," each of the corporate defendants and its affiliates shall, upon the written request of any applicant, grant to such applicant, including any of the defendants herein, a non-exclusive, non-assignable right to use, manufacture, and sell under any and all "production patents" where the patent or application therefor was owned by it on the date of the entry of this decree, without any conditions or restrictions whatsoever, except such suitable restrictions as may be necessary pursuant to U. S. C. title 35, Para. 49, 44 Stat. 1058, save that a reasonable and non-discriminatory royalty may be charged therefor, and save also that an independent auditor may be employed to inspect the books and records of licensees, *provided* that such independent auditor shall report to the licensor no information other than the amount of royalty due and payable. Nothing herein contained, however, shall prevent the granting by a defendant of preferential royalty rates to the United States or to any agency thereof or the assignee or assignees of such agency.

(c) In case of any controversy between any defendant or affiliate of any defendant and any applicant for a right to use, manufacture, and sell under any patent,

arising out of the terms of sections (a) or (b) of this paragraph, the refusal of the defendant or its affiliate to grant such right shall not be deemed a violation of this decree punishable by contempt, unless this Court, upon an order to show cause issued upon the petition either of the applicant refused such right or upon the petition of the United States of America, shall finally determine that such refusal was not justified under the provisions of this paragraph of the decree and the defendant or affiliate refusing to grant such right shall fail thereafter to comply with the directions of this Court.

(d) The defendant Dow Chemical Company and the Defense Plant Corporation, an agency of the United States Government, may agree upon what portion, if any, of the compensation to be paid to defendant Dow Chemical Company by Defense Plant Corporation under the provisions of any contract between them truly represents royalty for the licensee to use "production patents" and what portions of the compensation represents other considerations. If Defense Plant Corporation and defendant Dow Chemical Company are unable so to agree, then the portions of such compensation truly representing royalty for the use of "production patents" shall be determined by this Court. Any agreement so made or any determination by this Court in default of such agreement shall be conclusive upon all parties hereto.

VII

The defendants Aluminum Company of America and American Magnesium Corporation, or either of them, their affiliates, officers, directors, managers, employees and agents, and each of them, are hereby enjoined, as of the date of the entry of this decree, from assigning or transferring in any manner whatsoever any patents, or licenses to, or rights under patents to defendant Magnesium Development Corporation, and defendant Magnesium Development Corporation, its successors, officers, directors, managers, employees and agents, and each of them, are hereby enjoined, as of the date of entry of this decree, from receiving by way of assignment or

otherwise any such patents, and from purchasing, procuring or receiving any patents, or licenses to, or rights under patents.

VIII

The defendants, their affiliates, directors, officers, agents, employees and all persons acting for or in behalf of such defendants or their affiliates are hereby individually enjoined and restrained from:

(1) Entering into or renewing any agreement with I. G. Farbenindustrie A. G. or with any company known by the contracting defendant or its officers, directors, agents or employees to be an affiliate (as defined in Paragraph 2 (d) hereof) of I. G. Farbenindustrie A. G. without filing with the Department of Justice a copy of such agreement within ten (10) days after the date thereof;

(2) Entering into or continuing any agreement whereby defendant Aluminum Company of America or its affiliates or defendant American Magnesium Company or its affiliates purchase magnesium from defendant Dow Chemical Company at a quantity discount without such agreement requiring that defendant Dow Chemical Company file with the Department of Justice a copy of such agreement, within ten (10) days after the date thereof, and the United States of America shall have the right, upon twenty (20) days' notice to such defendants and at any time within forty (40) days after such filing, to petition this Court to have such agreement declared invalid under Section 2 of the Clayton Act as amended. In the event that the United States of America does not proceed to petition this Court as aforesaid within the said forty (40) days, it shall have no right to proceed under this paragraph.

IX

The defendant Aluminum Company of America and its affiliates are hereby individually enjoined and restrained from increasing their present interest in de-

fendant Magnesium Development Company, without first obtaining the written approval of the Department of Justice.

X

Upon showing that any defendant or affiliate has with intent to monopolize interstate commerce in magnesium or magnesium products in violation of the Act of Congress of July 2, 1890, entitled "An Act to Protect Trade and Commerce Against Unlawful Restraints and Monopolies" and acts amendatory thereof and supplemental thereto, arbitrarily refused to sell magnesium or magnesium products, or has combined, conspired or agreed with any other defendant to restrain interstate commerce in magnesium in violation of said Act or Acts by refusing to sell magnesium or magnesium products, the United States of America may upon ten (10) days' notice apply to this Court for supplemental injunctive relief restraining such violation.

XI

For all matters not specifically dealt with in this decree, and without implication of loss of other rights, the right of the United States of America to proceed against any of the defendants in any separate or independent legal proceeding, civil or criminal, in any district court of the United States, is hereby expressly reserved.

XII

For the purpose of securing compliance with this decree, and for no other purpose, duly authorized representatives of the Department of Justice shall, on the written request of the Attorney General or Assistant Attorney General and on reasonable notice made to each of the defendant corporations at its principal place of business, be permitted, subject to any legally recognized privilege, (1) reasonable access, during the office hours of said defendants, to all books, ledgers, accounts, correspondence, memoranda, and other rec-

ords and documents in the possession or under the control of said defendants relating to such matters as may from time to time be reasonably necessary for the purpose above stated; (2) subject to the reasonable convenience of the defendant corporations and without restraint or interference from them, to interview officers or employees of said defendants, in the presence of counsel, regarding any such matters as may from time to time be reasonably necessary for the purpose above stated; and (3) the defendant corporations, on such request, shall submit such reports in respect of any such matters as may from time to time be reasonably necessary for the purpose above stated; *provided, however*, that information obtained by the means permitted in this paragraph shall not be divulged by any representative of the Department of Justice to any person other than a duly authorized representative of the Department of Justice except in the course of legal proceedings for the purpose of securing compliance with this decree in which the United States is a party or as otherwise required by law, and further provided that a refusal to comply with any such request shall not be deemed a violation of this decree, punishable by contempt, unless this Court, upon an order to show cause issued upon the petition of the United States of America, shall finally determine that such request was justified, and the defendant shall thereafter fail to comply with such request.

XIII

Jurisdiction of this cause is retained for the purpose of enabling any of the parties to this decree to apply to this Court at any time for such further orders or directions as may be necessary or appropriate for the construction or carrying out of this decree, for the modification thereof (including but without being limited thereto, any modification in order to conform this decree to, or to give the defendants the benefit of, any Act of Congress enacted or repealed after the date of entry of this decree) for the enforcement of compliance there-

with, for the punishment of violations thereof, and for the termination thereof. Whenever obligations are imposed upon the defendants by laws or regulations of any state with which the defendants by law must comply in order to do business within such state, this Court, upon application of the defendants, or any of them, shall from time to time enter orders permitting the defendants to comply with such laws or regulations, and the right of the defendants to make such application and to obtain such relief is expressly granted.

XIV

Nothing in this decree shall be construed to restrict or prohibit in any way any action taken by the defendant corporations, their affiliates, officers, or employees in good faith and within the fair intendment of the letter of the Attorney General of the United States to the General Counsel of the Office of Production Management, dated April 29, 1941 (a copy of which is attached hereto as "Exhibit A"),¹ or with any amendment or amplification thereof by the Attorney General, or in accordance with any arrangement of similar character between the Attorney General and any national defense agency in effect at the time, provided that such letter or arrangement has not at the time of such action been withdrawn or canceled with respect thereto.

XV

This decree shall have no effect with respect to operations or activities outside the United States, its territories and the District of Columbia, not violative of the antitrust laws, or to operations and activities within the United States, its territories and the District of Columbia, relating exclusively to acts and operations outside the United States, its territories and the District of Columbia, not violative of the antitrust laws, or to operations and activities, wherever performed, authorized or permitted by the Act of Congress of April 10, 1918, commonly called the Webb-Pomerene Act, or by acts amendatory thereto.

XVI

The Alien Property Custodian, having entered a formal appearance in this proceeding and having become a party herein, hereby consents to the entry of this decree and agrees to be bound by the provisions thereof. Pursuant to such consent and this agreement to be bound, the Alien Property Custodian further agrees to the provisions of this decree limiting or prohibiting royalties under patents, providing for compulsory licensing under them, and prohibiting and enjoining the further transfer in any manner whatsoever of any patents, licenses to or rights under patents to defendant Magnesium Development Corporation by defendants Aluminum Company of America and American Magnesium Corporation. The consent of the Alien Property Custodian to the entry of this decree and this agreement to be bound, however, shall not affect such further rights of the Alien Property Custodian to any property or the proceeds thereof, or rights therein, as may remain unaffected by the terms of this decree, and all such right, title and interest of the Alien Property Custodian in any property or the proceeds thereof as between the Alien Property Custodian and any of the defendants is hereby expressly reserved.

Dated April 15, 1942.

Approved:

ALBERT C. COXE,

United States District Judge.

EXHIBIT "A"

APRIL 29, 1941

JOHN LORD O'BRIAN, ESQUIRE,

*General Counsel, Office of Production Management,
Washington, D. C.*

DEAR JOHN: The marshaling of the nation's industrial assets for a maximum productive effort in the national defense will doubtless require the allocation of orders, the curtailment of some kinds of production so as to increase production in defense fields, and the establishment of priorities and price ceilings. Furthermore, many of these steps must necessarily affect the production of goods used to satisfy our normal needs, as well as the production of materials and implements used directly in our defense effort.

Some of these acts if accomplished by private contract or arrangement within an industry and carried on for private advantage would probably constitute violations of the anti-trust laws. On the other hand, it is obvious that in the present emergency acts performed by industry under the direction of public authority, and designed to promote public interest and not to achieve private ends, do not constitute violations of the antitrust laws. In these circumstances, the Department of Justice recognizes that business interests which are asked to comply with public plans for increasing production and preventing inflation are entitled to the cooperation of agencies of the Government in eliminating any uncertainties which may exist as to the application of the antitrust laws to their activities.

Accordingly, this Department has formulated a policy which it proposes to follow in its relations with the Office of Production Management and the Office of Price Administration and Civilian Supply and with all industries or contractors acting in compliance with the orders or request of either of these organizations. The important points of this policy are:

Meetings of the industry with the Office of Production Management and the Office of Price Administration and Civilian Supply or their representatives are not illegal. In-

dustrial committees may be formed at the request of the Office of Production Management or the Office of Price Administration and Civilian Supply, to work with representatives of such offices on problems involving defense. There will be nothing unlawful in the industry cooperating in the selection of its representatives or in selecting members for committees, or in the activities of such committees provided they are kept within the scope of this letter.

Questions as to whether there is need for such a committee, and if so, how it shall be chosen, and by whom constituted, shall be the sole responsibility of the Office of Production Management or the Office of Price Administration and Civilian Supply. This Department will not participate in these decisions beyond the suggestion now made that any such committee should be generally representative of the entire industry and satisfactory to the Office of Production Management or the Office of Price Administration and Civilian Supply.

Each industry committee shall confine itself to collecting and analyzing information and making recommendations to the Office of Production Management or the Office of Price Administration and Civilian Supply, and shall not undertake to determine policies for the industry, nor shall it attempt to compel or to coerce any one to comply with any request or order made by a public authority.

All requests for action on the part of any unit of an industry shall be made to such unit by the Office of Production Management or the Office of Price Administration and Civilian Supply and not by the industry committee. That is to say, the function of determining what steps should be taken in the public interest should in each case be exercised by the public authority which may seek the individual or collective advice of the industry. But the determination shall not be made by the industry itself or by its representatives.

Requests for action within a given field, such as the field of allocation of orders, shall be made only after the general character of the action has been cleared with the Department of Justice. If the general plan is approved, thereafter each request for specific action in carrying out such plan shall be

made in writing and shall be approved by the Office of the General Counsel of the Office of Production Management or the office of the General Counsel of the Office of Price Administration and Civilian Supply, but need not be submitted to the Department of Justice. In the case of any change in the personnel of such offices or if serious practical difficulties arise, this latter arrangement may be revoked upon notice from me.

Acts done in compliance with the specific requests made by the Office of Production Management or the Office of Price Administration and Civilian Supply and approved by their General Counsel in accordance with the procedure described in this letter will not be viewed by the Department of Justice as constituting a violation of the antitrust laws and no prosecutions will be instituted for acts performed in good faith and within the fair intendment of instructions given by the Office of Production Management or the Office of Price Administration and Civilian Supply pursuant to this procedure.

In the case of all plans or procedure, however, the Department reserves complete freedom to institute civil actions to enjoin the continuing of acts or practices found not to be in the public interest and persisted in after notice to desist.

With kind personal regards,

Sincerely,

(S) ROBERT H. JACKSON,

Attorney General.